Nordin bin Salleh v Kerajaan Negeri Kelantan & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPLICATION NO 08-10-1993
GUNN CHIT TUAN CJ (MALAYA)
3 SEPTEMBER 1993

Constitutional Law *— Application for leave to commence proceedings — Application for declaration that state law is inconsistent with provisions of the Constitution and that it deals with a matter with respect to which the state legislature has no power to make laws — Whether leave of judge of Supreme Court required — Kelantan Council of Religion and Malay Custom Enactment s 73 — Federal Constitution arts 4(1), (3) and (4) and 10(1)(a)*

The applicant sought leave to file proceedings for declarations that s 73 of the Kelantan Council of Religion and Malay Custom Enactment 1966 ('the Enactment') was invalid on the grounds that: (a) it made provisions with respect to matters to which the legislature of the state of Kelantan had no power to make laws; (b) alternatively, that s 73 was invalid to the extent that it included a 'pegawai masjid'; and (c) that s 75 of the Enactment was void pursuant to art 4(1) of the Federal Constitution ('the Constitution') on the grounds that it was inconsistent with art 10(1) of the Constitution.

Held, granting leave to the applicant to file proceedings in the Supreme Court:

(1) As ground (c) was to seek a declaration that s 73 of the Enactment was void on the grounds that it was inconsistent with the provisions of art 10(1)(a) of the Constitution and not on the grounds that it dealt with a matter with respect to which the Kelantan legislature had no power to deal with, the High Court has jurisdiction in the matter and the leave of a judge of the Supreme Court was not required.

(2) As for grounds (a) and (b), the court was satisfied that the applicant had an arguable case in that the application was not frivolous. The Enactment was a post-Merdeka legislation and the intended challenge was on the competency of the Kelantan state legislature to enact the legislation. The two prayers were not merely grounded on the impugned law being inconsistent with the Constitution, the validity of the legislation was also to be challenged on the grounds that it dealt with a matter with respect to which the state legislature had no power to make law. As such, leave of a judge of the Supreme Court was required under art 4(4) and the applicant should be allowed to canvass his case before the full court on the constitutionality and validity of that section in the said Enactment.

[Bahasa Malaysia summary

Pemohon telah memohon kebenaran untuk memfailkan prosiding mendapatkan deklarasi bahawa s 73 Enakmen Majlis Agama dan

A Adat Melayu Kelantan 1966 ('Enakmen itu'), adalah tidak sah atas alasan bahawa: (a) ia membuat peruntukan mengenai perkara yang badan perundangan negeri Kelantan tidak mempunyai kuasa untuk diperbuatkan sebagai undang-undang; (b) secara alternatif, bahawa s 73 adalah tidak sah setakat mana ia meliputi 'pegawai masjid'; dan (c) bahawa s 73 Enakmen itu adalah tidak sah mengikut perkara 4(1)
B Perlembagaan Persekutuan ('Perlembagaan itu') atas alasan ia tak konsisten dengan perkara 10(1) Perlembagaan itu.

Diputuskan, membenarkan pemohon memfailkan prosiding di Mahkamah Agung:

C (1) Oleh kerana alasan (c) adalah untuk mendapatkan suatu deklarasi bahawa s 73 Enakman itu tidak sah atas alasan bahawa ia tidak konsisten dengan peruntukan perkara 10(1)(a) Perlembagaan itu dan bukan atas alasan bahawa ia berkenaan dengan perkara yang badan perundangan negeri Kelantan tidak mempunyai kuasa untuk bertindak terhadap, Mahkamah Tinggi mempunyai bidangkuasa
D dalam perkara itu dan kebenaran hakim Mahkamah Agung tidak diperlukan.

(2) Mengenai alasan (a) dan (b), mahkamah berpuas hati bahawa pemohon mempunyai kes yang dapat dipertahankan, iaitu permohonan itu tidak remeh. Enakmen itu adalah suatu
E perundangan selepas Merdeka dan cabaran yang dimaksudkan itu adalah mengenai kompetenan badan perundangan negeri Kelantan untuk memperbuat perundangan itu. Dua permohonan itu tidak hanya berasaskan fakta bahawa undang-undang yang dipersoalkan itu tidak konsisten dengan Perlembagaan itu, juga keesahan undang-undang itu juga boleh dicabar atas alasan bahawa
F ia berkaitan dengan perkara yang badan perundangan negeri tidak mempunyai kuasa untuk diperbuatkan sebagai undang-undang. Oleh itu, kebenaran hakim Mahkamah Agung diperlukan di bawah perkara 4(4) Perlembagaan itu dan pemohon patut dibenarkan mengemukakan kesnya di hadapan mahkamah penuh anggota
G mengenai keperlembagaan dan keesahan seksyen tersebut di dalam Enakmen itu.]

Cases referred to

1 *Mamat bin Daud & Ors v Government of Malaysia* [1986] 2 MLJ 192 (refd)
H 2 *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 (refd)
3 *Syarikat Banita Sdn Bhd v Government of State of Sabah* [1977] 2 MLJ 217 (refd)
4 *Rethana v Government of Malaysia* [1984] 2 MLJ 52 (refd)
5 *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit*
I *Mertajam & Anor* [1992] 1 MLJ 1 (refd)
6 *Ramasamy a/l Shanmugam v State Government of Penang & Government of Malaysia* [1986] 2 MLJ 188 (refd)
7 *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119 (refd)

Legislation referred to

Federal Constitution arts 4(3), (4), Ninth Schedule State List item 1
Kelantan Council of Religion and Malay Custom Enactment 1966 ss 73
Syariah Courts (Criminal Jurisdiction) Act 1965 s 2

Dato' Zaki bin Tun Azmi (*Wan Ismail* and *Alex De Selva* with him) (*Rashid & Lee*) for the applicant.

Ahmad bin Hj Maarop (State Legal Advisor) for the first respondent.

Zainur Zakaria (*Yusof bin Hj Mohd Nor* and *Sukri bin Hj Mohamed* with him) (*Zainur Zakaria & Co*) for the second respondent.

Gunn Chit Tuan CJ (Malaya): This was an application by notice of motion for leave to commence proceedings pursuant to art 4(4) of the Federal Constitution ('the Constitution'). Article 4(3) and (4) of the Constitution provide as follows:

> (3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or—
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> (a) if the law was made by Parliament, in proceedings between the Federation and one or more States;
> (b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.
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> (4) The proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Supreme Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause.

The applicant, Nordin bin Salleh, sought leave to file proceedings for declarations that s 73 of the Kelantan Council of Religion and Malay Custom Enactment 1966 ('the Enactment') is invalid on the following grounds set out in his notice of motion dated 9 April 1993:

(a) A declaration that s 73 of the Enactment is invalid on the grounds that it makes provision with respect to a matter with respect to which the legislature of the state of Kelantan had no power to make on the following grounds:

> (1) it creates an offence which is not an offence against the precepts of Islam;
> (2) it is not a matter relating to the precepts of Islam;
> (3) it is a matter with respect to which the Parliament has exclusive power to legislate in respect of, as set out in cl 4 of the Ninth Schedule (List 1 — Federal List) and which the state of Kelantan has no power.

(b) Alternatively, a declaration that s 73 is invalid to the extent that it includes 'pegawai masjid' on the following grounds:

A (1) contempt of the lawful authority of the pegawai masjid does not constitute an offence against the precepts of Islam;
(2) it is not a matter relating to the precepts of Islam;
(3) it is a matter with respect to which the Parliament has exclusive power to legislate in respect of, as set out in cl 4 of the Ninth Schedule (List 1 — Federal List) and which the state of Kelantan
B has no power;

(c) A declaration that s 73 of the Enactment is void pursuant to art 4(1) of the Constitution on the grounds that it is inconsistent with art 10(1)(a) of the Constitution.

C Section 73 of the Enactment is as follows:

> Whoever, shall be guilty of any contempt of the lawful authority of His Highness the Sultan in his capacity as the Head of the religion of the State, or of the Majlis or any Committee or member or officer thereof, or of any Court, or the presiding officer thereof, or of pegawai masjid, shall be punishable with imprisonment for a term not exceeding three months or with fine not exceeding $500.
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> D Provided that a person not professing the Islamic religion who commits an offence under this section shall be tried in the Magistrates Court.

The facts which gave rise to the application are set out in the affidavit of Nordin bin Salleh affirmed on 7 April 1993. Briefly the salient facts were that on 3 March 1993, the applicant was served with two separate summons E sent by the Chief Kadi of Kelantan charging him pursuant to s 73 of the Enactment with insulting a mosque official because he had lodged two separate police reports against the mosque official. The first ground, as set out above, upon which the plaintiff relied upon to seek a declaration that s 73 of the Enactment is invalid is because it makes provision with respect to a matter which the legislature of the state of Kelantan had no power to F make. Dato' Zaki bin Tun Azmi, the leading counsel for the applicant, stated that the validity of the said s 73 was to be challenged on the ground that it deals with a matter with respect to which the legislature of the state of Kelantan has no power to make that law. As such, the leave of a judge of the Supreme Court is required as provided for under art 4(4) of the Constitution. Counsel stated that the applicant was merely required to G show that he had an arguable case which was not frivolous. He referred to *Mamat bin Daud & Ors v Government of Malaysia*[1] in which case Mohd Azmi SCJ had pointed out that in order to succeed, an applicant must satisfy the court firstly, that leave is necessary under art 4(4) and secondly, that they have an arguable case in that the application is not frivolous. In this case, the applicant is challenging the said s 73 on the grounds that it H deals with a matter in respect of which the legislature or the state of Kelantan has no power to make law and as the application is not frivolous, the applicant should be allowed to canvass his case before the full court on the constitutionality and validity of that section.

Counsel then referred to item 1 of the State List in the Ninth Schedule I of the Constitution which is as follows:

> Except with respect to the Federal Territories of Kuala Lumpur and Labuan, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, bethrothal, marriage, divorce, dower, maintenance, adoption, legitimacy,

guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State: Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organisation and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph. but shall not have jurisdiction in respect of offences except in so far as conferred by federal law [see Muslim Courts (Criminal Jurisdiction) Act 1965 (No 23 of 1965)] the control of propagating doctrines and beliefs among persons professing the religion or Islam; the determination of matters of Islamic law and doctrine Malay custom.

He submitted that the offence created by the said s 73 of the Enactment was not against the precepts of Islam nor is it a matter relating to the precepts of Islam and contended that it is a matter in respect of which Parliament has exclusive power to legislate as set out in item 4 of the Federal List in the Ninth Schedule of the Constitution. Counsel pointed out that the application was supported by an affidavit affirmed on 8 April 1993 by one Razali bin Nawawi who is currently an Associate Professor and Lecturer of Syariah Law at the Faculty of Law, International Islamic University, Malaysia. He also pointed out that at para 5 of Razali bin Nawawi's said affidavit, he has stated as follows:

> In accordance with my knowledge and opinion of the precepts of 'Hukum Syarak' there is no such concept or meaning of 'contempt' ('menghina or mengeji') as contained in s 73 of the Kelantan Council of Islamic Religion and Malay Custom Enactment 1966.

And at para 6 he has also stated as follows:

> The precepts of the Islamic religion as stated in the 'Hadith Rasulallah' are: 'mengucap dua kalimah shahadah'; praying at five designated times (sembahyang lima waktu); fasting during the month of Ramadhan (puasa bulan Ramadhan); payment of alms (berzakat); pilgrimage (menunaikan Fardhu Haji). The precepts of Iman (rukun-rukun Iman) are: believing in Allah and His Prophet (Allah dan RasulNya); angels (malaikat); the Holy Books (Kitabullah); 'Quadar dan Qadha'; judgment day (hari qiamat). Therefore, the act of 'contempt' ('mengeji, menghina atau mencerca') towards any person whomsoever (except Allah and Rasulallah SAW) is not within the precepts of the Islamic religion and the 'rukun-rukun Iman' as the precepts of the Islamic religion and the 'rukun-rukun Iman' are clear.

Dato' Zaki therefore submitted that the legislature of the State of Kelantan, in enacting the said s 73, has enacted a law in relation to a matter which does not constitute an offence against the precepts of Islam or Islamic law.

The alternative ground upon which the applicant relied on was that s 73 of the Enactment is inconsistent with art 10(1)(a) of the Constitution which provides that every citizen has the right to freedom of speech and expression. He pointed out restrictions on a citizen's fundamental right to free speech are set out in cll (2), (3) and (4) of art 10 and that only Parliament, not the

A State legislature, may by law impose such restrictions. It was the submission of the applicant that the lodging of a police report is the exercise by a citizen of his or her right to free speech. It was therefore submitted that if s 73 of the Enactment enables the Kelantan council to charge a citizen with contempt for filing a police report against a mosque official, then the direct effect of that section is to impinge upon a citizen's right of free speech.

B Counsel then referred again to item I of the State List and pointed out that it is provided that 'except in regard to matters included in the Federal List, the constitution, organization and procedure of syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by Federal law.' He therefore contended that before the syariah courts have jurisdiction to try an offence, jurisdiction in respect of that offence must have been conferred on the syariah courts by Federal law. Counsel then referred to the following s 2 of the Syariah Courts (Criminal Jurisdiction) Act 1965 and stated that that section only confers criminal jurisdiction on the syariah courts in relation to offences against the precepts of the religion of Islam:

> The Syariah Courts duly constituted under any law in a State and invested with jurisdiction over persons professing the religion of Islam and in respect of any of the matters enumerated in List II of the State List of the Ninth Schedule to the Federal Constitution are hereby conferred jurisdiction in respect of offences against precepts of the religion of Islam by persons professing that religion which may be prescribed under any written law:
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> Provided that such jurisdiction shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding three years or with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or with any combination thereof.

Counsel then contended that the syariah courts only have jurisdiction to try offences against the precepts of Islam and submitted that the offence of contempt against the pegawai masjid as provided for in s 73 of the Enactment does not constitute an offence against the religion of Islam and accordingly, the legislature of the state of Kelantan did not have the power to enact the following s 59(2) of the Enactment which purports to give jurisdiction on a syariah court in relation to an offence which has not been conferred by Federal law:

> Save as otherwise in this Enactment expressly provided, no prosecution for any offence against this Enactment shall be had in any Court other than the Court of the Kadzi Besar or a Court of a Kadzi.

It was therefore the submission of counsel that the said s 59(2) of the Enactment must be invalid to the extent that it purports to grant the courts of the kadi besar or kadi jurisdiction to deal with an offence pursuant to s 73 of the said Enactment on the grounds that the state legislature of Kelantan had no power to enact such a law.

Encik Zainur Zakaria, counsel for the second respondent, after referring to the above-quoted prayer (c) in the notice of motion, then referred to *Ah Thian v Government of Malaysia*[2] in which case Suffian LP (as he then was) had held that as the argument of the applicant in that case was that the

Firearms (Increased Penalties) (Amendment) Act 1974 was ultra vires the Constitution as it contravened art 8(1) of the Constitution and was therefore void, cl (4) of art 4 of the Constitution did not apply and the point may be raised in the ordinary way in the course of submission and determined in the High Court without reference to the then Federal Court and there was no need for leave of a judge of the Federal Court. Counsel submitted that similarly, in this case, no leave of a judge of the Supreme Court was required for prayer (c) of the said notice of motion.

He then referred to *Syarikat Banita Sdn Bhd v Government of State of Sabah*[3] in which case Suffian LP (as he then was) again held that as the validity of the new sub-s (7) of s 24 of the Sabah Forest Enactment 1968 is to be challenged on the ground that it is contrary to the provisions of the Constitution and not on the grounds that it deals with a matter with respect to which the Sabah legislature has no power to make law, the High Court has jurisdiction in the matter and the leave of a judge of the then Federal Court was not required. Counsel also referred to *Rethana v Government of Malaysia*[4] in which case Mohd Azmi FJ (as he then was), held that the Employees' Social Security Act 1969, was challenged in that case not on the basis that Parliament has no power to enact it but on the grounds that some of its provisions are inconsistent with certain provisions of the Constitution. The intended suit was within the jurisdiction of the High Court and therefore the provisions of art 4(4) of the Constitution regarding leave to commence proceedings in the then Federal Court did not arise. Encik Zainur therefore concluded that the leave of a judge of the Supreme Court was not necessary under art 4(4) of the Constitution regarding that prayer.

Next it was contended by Encik Zainur that it was not for the Supreme Court to decide what is meant by the expression 'precepts of Islam'. He referred to *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor*[5] at p 9 in which case Mohd Yusoff SCJ (as he then was) had stated that the foremost question to be determined is whether the deceased in that case had renounced Islam during his lifetime and the only forum qualified to answer that question is the syariah court. He contended that the application in this case for leave to commence proceedings pursuant to art 4(4) of the Constitution was frivolous and should be determined by the syariah court.

Encik Yusof bin Hj Mohd Nor, another counsel for the second respondent referred to cl 9 of the State List in the Ninth Schedule of the Constitution which is as follows:

> Creation of offences in respect of any of the matters included in the State List or dealt with by State law, proof of State law and of things done thereunder, and proof of any matter for purposes of State law.

He then referred to art 74(4) of the Constitution which is as follows:

> Where general as well as specific expressions are used in describing any of the matters enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter.

He therefore contended that the said s 59 of the Enactment could be enacted by virtue of the above-quoted item 1 of the State List in the Ninth Schedule of the Constitution.

Encik Ahmad bin Hj Maarop, the state legal advisor of Kelantan, appearing for the first respondent, adopted the submissions of the other counsel for the second respondent, and referred to *Ramasamy a/l Shanmugam v State Government of Penang and Government of Malaysia*[6] in which case the applicant had applied for a declaration that the Hindu Endowments Ordinance 1906 (Straits Settlements Cap 175) is invalid and void. He applied for leave under art 4(4) of the Constitution and Mohd Azmi SCJ held that a declaration under art 4(4) read with art 128(1)(a) applies only to post-Merdeka law whether Federal or State. Since the Hindu Endowments Ordinance 1906 (Straits Settlements Cap 175) is a pre-Merdeka law, the application should not have been brought to the Supreme Court as a court of first instance. Counsel then referred to s 87 of the Enactment, which repealed the Council of Religion and Malay Custom and Kadzis Courts Enactment 1953. He therefore contended that the Enactment is a pre-Merdeka law and that therefore, the present application should not have been brought to the Supreme Court in the first instance. He then referred to *Mamat bin Daud & Ors v Government of Malaysia*,[7] in which case the Supreme Court by a majority of 3 to 2 held that the provisions of s 298A of the Penal Code (FMS Cap 45) is a colourable legislation in that it pretends to be a legislation on public order, when in pith and substance it is a law on the subject of religion with respect to which only the states have power to legislate under arts 74 and 77 of the Constitution. He therefore contended that as s 73 of the Enactment was concerned with contempt of religion, it should therefore be within the power of the state legislature to enact it.

As para (c) of the notice of motion was to seek a declaration that s 73 of the Enactment was void on the grounds that it was inconsistent with the provisions of art 10(1)(a) of the Constitution and not on the grounds that it dealt with a matter with respect to which the Kelantan legislature had no power to deal with, the High Court has jurisdiction in the matter and the leave of a judge of the Supreme Court was not required. As for the prayers in paras (a) and (b) of the notice of motion, I was satisfied that the applicant had an arguable case in that the application is not frivolous. I am of the view that the Enactment is a post-Merdeka legislation and the intended challenge is on the competency of the Kelantan state legislature to enact the legislation. The two prayers are not merely grounded on the impugned law being inconsistent with the Constitution, also the validity of the legislation is to be challenged on the grounds that it deals with a matter with respect to which the state legislature has no power to make law. As such, leave of a judge of the Supreme Court is required under art 4(4) and the applicant should be allowed to canvass his case before the full court on the constitutionality and validity of that section in the said Enactment. I therefore made an order granting leave to the applicant to file proceedings in the Supreme Court for declarations in terms of prayers (a) and (b) of the said notice of motion.

Order accordingly.

Reported by Prof Ahmad Ibrahim